Supreme Court, U.S.
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NO. 96-12

In the Supreme Court of the United States

OCTOBER TERM, 1995

Ilene Thurman Hunter, on behalf of Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, Melissa Ilene Hunter, and Donovan Blaine Hunter,

Petitioners,

v.

Knoll Rig and Equipment Manufacturing Company, Ltd., (a Subsidiary of Dreco Group of Companies, Ltd.) and National Union Fire Insurance Company of Pittsburgh, PA.

Respondents,

v.

Fidelity and Casualty Company of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Petitioners read the Brief of the Respondents as raising issues that accentuate the conflict between the Circuit Courts on whether to liberally or strictly construe and apply Fed.R.Civ.P. 50(a) (2) when reviewing the trial court's denial of a jury verdict loser's motion for judgment as a matter of law. This conflict in the interpretation and application of Rule 50(a) (2) by the Courts result in different degrees of protection to be afforded by, and violations of, the Seventh Amendment of the U.S. Constitution. These issues will be discussed as the Petitioners respond to arguments raised by KREMCO.

1. The Respondents contend this Court has no jurisdiction over the Fed.R.Civ.P. 50(a) (2) and Seventh Amendment Issues.

KREMCO failed to set forth the appropriate standard of review and any specific motion that preserved any legal issue for review by the appellate court. Fed.R.Civ.P. 50 was never discussed. KREMCO cited *Myers v. American Seating Co.*, 637 So.2d 771 (LA. App. 1 Cir.1994), discussed infra. The Hunters thought KREMCO was arguing for the application of the Louisiana procedure that allows appellate review of the facts. It was in response to the citation of *Myers* that the Hunters argued the proper standard for reviewing the jury verdict was stated in *Prestenbach v. Rains*, 4 F.3d 358, 361 (5th Cir.1993). This argument does not waive the Hunters' right to contest, nor does it give the appellate court the right to abdicate its duty to determine, whether specific legal questions were preserved under Rule 50 to empower the appellate court to review the sufficiency of the evidence. *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209 (7th Cir.1995) and *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496 (T.E.C.A. 1985 at pages 504-505).

An erroneous statement by the Hunters, *after* the majority decision, in the Suggestion for Rehearing En Banc[1]

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[1] The erroneous statement is explained in Appendix RB, at RA-3 to RA-20.

does not legitimize the unconstitutional decision. The Suggestion asserted:

> *ISSUE #2:* The Hunters contend this Court has made findings of fact in reaching conclusions and making inferences from the conflicting evidence that are at odds with the jury verdict, with the province of the jury to decide this case, and with the Hunters' right to a trial by jury as guaranteed by the 7th Amendment of the U.S. Constitution. Is this decision inconsistant with *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc) and the 7th Amendment of the U.S. Constitution?

On March 28, 1996, the Suggestion was denied.

On May 20, 1996, the Hunters filed a "Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction" (Appendix RC, RA-21).

The Hunters prepared twenty (20) copies of an Original Brief (Apendix RB, RA-3 to 20) and an Appendix (223 pages) on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment Granted Under Fed.R.Civ.P. 50 for Lack of Jurisdiction that were received by the Fifth Circuit on June 3,1996. On June 5, 1996, the Hunters were informed by a Deputy Clerk (Appendix RA, RA-1):

> Appellants' Notice of Intent to Move to Void Judgment, etc., was received on May 20, 1996; appellants' Brief and Appendix on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment, etc. were received on June 3, 1996.
>
> Confirming our telephone conversation of this date, and at the direction of the Court, these documents are being returned unfiled with the advice that the Court has already ruled and no further action will be taken in this case.[2]

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[2] The "FILED" stamp dated 5/20/96 on the Notice of Intent to Void Judgment, etc., was altered to read "REC'ED". The Deputy Clerk said she could not tell counsel for the Hunters which judge(s) directed the pleadings to be returned "unfiled". Counsel of record suspects the pleadings were reviewed only by the judge who wrote the opinion. On June 11, 1996, Justice Barksdale authored another opinion against a very strong dissent that reversed a judgment based on a jury verdict in favor of a Louisiana product liability claimant, and rendered judgment as a matter of law to

The lower court must have reviewed the record to resolve the issue of whether there was a Rule 50(a) motion at the close of all the evidence to have the *power* to review the sufficiency of the evidence. *McArthur v. University of Tex. Health Center Tyler,* 45 F.3d 890 (5th Cir.1995); *McCann v. Texas City Refining, Inc.,* 984 F.2d 667, 671 (5th Cir.1993). Respondents even admit by their argument at pages 8 to 9 of their Brief that the Rule 50(a) issue must have been reviewed and resolved in their favor by the Fifth Circuit.

This Court has the jurisdiction to decide the Rule 50 and Seventh Amendment issues which have been raised or resolved in the lower court. *Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976).

2. The Respondents contend that following the "liberal view" of Fed.R.Civ.P. 50, they either complied, or the lower court excused or waived the Respondents' non-compliance, with Fed.R.Civ.P. 50(a).

KREMCO did not state any reasons "off the record, during a recess" why the Motion to Dismiss made at the close of the Hunters' case should be granted. There was a discussion off the record, but this was not during a recess. Counsel recalls approaching the Bench with counsel for KREMCO who advised Magistrate Payne that KREMCO wanted to present a motion outside the presence of the jury. Magistrate Payne immediately proceeded to recess: "Ladies and Gentlemen, we're gonna take a recess now. There may be some things that we might be able to work out to save some time throughout the presentation of the Defendant's evidence, so we'll take a recess at this time." During the recess, Magistrate Payne stated: "You had made reference, Mr. Raney, to some motion, I believe, that you wanted to make at the next recess. This is the next recess." Counsel for KREMCO responded: **"Yes, Sir, we would move to dismiss at this time on a directed verdict, Your Honor."**

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footnote 2 continued

the product manufacturer. *Guilbeau v. W.W. Henry Co.,* 85 F.3d 1149 (5th Cir.1996). This decision confirms a liberal interpretation and application of Rule 50 in favor of verdict losers.

After this motion was denied, KREMCO presented the testimony of eight (8) witnesses over a period of two (2) days. The Hunters called five (5) rebuttal witnesses. Following the close of all the evidence, KREMCO stated: **"And we would re-urge our motion at this time of dismissal."**

In this case, the "liberal view" of what constitutes a specific motion under Rule 50(a) (2) has allowed the Court of Appeals to re-examine facts tried by a jury in violation of the Seventh Amendment. *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996). By granting the writ application, this Court can correct this injustice, and resolve the conflict with the Seventh Circuit which follows the plain language of, and rigidly applies, Rule 50. *Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132 (7th Cir.1994) at page 1139, and *Umpleby*, supra.

3. The Respondents contend that following the "liberal view" of Fed.R.Civ.P. 50(b), they should be allowed to add specifications that were not included in the Rule 50(a) (2) motion, and the Hunters' failure to object in the trial court to this deficient motion waives their right to object before the Appellate Court and this Court.

Following judgment for the Hunters, KREMCO filed a "Motion for Judgment as a Matter of Law" requesting the jury verdict to be "set aside", and "exonerated" (Appendix RD, RA-24). This motion, including the memorandum (Appendix RE, RA-27), does not allege that it is renewing any previous motion. Only by a very liberal interpretation and application of Rule 50(b) could the Fifth Circuit find compliance. But as this Court held in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 73 S.Ct. 125 (1952), a verdict loser's motion to "set aside" the jury's verdict did not comply with Rule 50(b)'s requirement of a timely motion for judgment *n.o.v.* And as this Court stated in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072 (1967), at 1078, after discussing *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1947), *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948), *Johnson*, supra, and *Weade v. Dichmann, Wright, and Pugh*,

Inc., 337 U.S. 801, 69 S.Ct. 1326, 93 L.Ed. 1704 (1949): "**The opinions in the above cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b)...**" (Emphasis added.) Again, there is a conflict between the Circuits on whether to liberally or strictly construe and apply Rule 50(b) in concert with Rule 50(a) (2) that could be resolved by this Court. *McArthur* and *Umpleby,* supra.

Also, KREMCO argues that the right to a jury trial was "waived" because the Hunters failed to timely object to its deficient Rule 50(b) motion. KREMCO contends this case stands in the same posture as *Whelan v. Abell,* 48 F.3d 1247 (D.C. Cir.1995); the only difference being that the trial court granted the Rule 50(b) motion. The jurisprudence demonstrates there is a substantial difference between the trial court granting and denying a motion for judgment as a matter of law that does not comply with the specificity requirements of Rule 50(a). 9A Wright & Miller, *Federal Practice & Procedure: Civil 2d,* §2533, page 314 (1994):

> The important point is that the trial court cannot err in passing on a motion for judgment as a matter of law that does not state the grounds sufficiently. If it denies the motion, the moving party may not complain about the denial on appeal. Conversely if it grants the motion, an adverse party who did not object to the lack of grounds in the trail court may not raise this point in the appellate court.

The result in *Whelan* is consistent with prior jurisprudence. However, the "waiver" reasoning would be in conflict with other circuit courts if it would be applied to allow a "waiver" of the right to a jury trial to be raised in the appellate court after the trial court *denied* the motion. The apparent conflict presented by *Whelan* is another reason to grant the writ.

4.The Respondents contend the Hunters were not "ambushed".

The Hunters were "ambushed". The flawed legal argu-

ment of KREMCO that persuaded the majority panel to decide the "threshold issue"[3] in a product liability case is whether the product is being subjected to a reasonably anticipated use was first presented after the jury verdict. The jury interrogatories (Appendix F, A-34 to A-37) show the jury was instructed to determine the "threshold issue": "Do you find by a preponderance of the evidence that, at the time the racking board of the workover rig left KREMCO's control, it was unreasonably dangerous in design, or because of an inadequate warning or breach of an express warranty?" Only if the jury answered YES would the jury answer the second interrogatory: "Do you find by a preponderance of the evidence that Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product?" The Hunters contend by not analyzing the unreasonably dangerous characteristics of the product first, the Court could not appreciate what should be the reasonably anticipated uses to be expected by the manufacturer.

And if needed, there was additional evidence that the Hunters could have introduced at the close of the evidence.[4] KREMCO's defense strategy at that time was to win a jury verdict. Therefore, the sufficiency of the evidence was not reviewable on appeal. See 9A Wright & Miller, *Federal Practice and Procedure: Civil 2d* §2536, at 329-331 (1994).

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[3] KREMCO argues the "reasonably anticipated use" of the product is a "threshold *element*", apparently retreating from its earlier argument to the Fifth Circuit that it is the "threshold *issue*". The Hunters agree the reasonably anticipated use is an element that must be proven, but the utility of the product must be analyzed in relationship to the unreasonably dangerous charcteristics, such as the alternative designs that were capable of preventing Hunter's death. LA.R.S. 9:2800.56.

[4] J. Robert Kubelka, a drilling rig equipment and safety consultant, who worked his way up through the oifield, including several years as a derrickman, was present during the entire trial. The case developed so well he was not called as a witness during the presentation of the case, or in rebuttal. Also, there were several depositions of out of state witnesses, and videotapes of pipe racking operations that had been approved by magistrate Payne, that could have been introduced.

5. The Respondents contend the Hunters waived their right to a jury trial by moving for a judgment as a matter of law on the "reasonably anticipated use" issue.

This argument is contrary to the official comment for the 1991 Amendment, Subdivision (a): "Thus, it should not be necessary to state in the test of this Rule that a motion made pursuant to it is not a waiver of the right to jury trial, and only the antiquities of directed verdict practice suggest that it might have been." The Hunters have not waived their right to a jury trial by moving for a judgment as a matter of law on their own behalf.

6. The Respondents contend that *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) is inapplicable to this case.

The Fifth Circuit did not follow *Anderson* (1) by applying the correct substantive evidentiary standard of proof that was applied at the trial on the merits, (2) by leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts, to the jury, and (3) by believing the evidence of the non-movant, and all justifiable inferences to be drawn in his favor. The jury instruction on reasonably anticipated use was: "In addition to the burden of proving that the product possessesd an unreasonably dangerous characteristic, the Plaintiffs must prove that the damage arose from a reasonably anticipated use of the product. *In other words, the way Mr. Hunter was using the product must have been something the manufacturer should expect might happen during the life of the product.*" (Emphasis added, TTR. 903.) This standard was not followed when reasonably anticipated use was analyzed to be equivalent to the common use of the product.

The Circuit Courts are divided on the proper standard to be applied in reviewing the sufficiency of the evidence. See 9A Wright & Miller, *Federal Practice & Procedure: Civil 2d*, §2529 (1994). By granting this writ, this Court could resolve the conflict.

7. The Respondents contend *Myers v. American Seating Co.*, 637 So.2d 771 (LA. App. 1 Cir.1994) supports the

Fifth Circuit decision in this case.

Myers supports the Hunters! Myers had stepped onto the rear of a folding chair which folded causing her foot and leg to slip through the opening and suffer a personal injury. In a jury case, the trial judge granted a directed verdict. The First Circuit reversed the directed verdict holding that reasonable people could have reached a different conclusion.

KREMCO's erroneous interpretation of *Myers* is the foundation for the decision of the majority panel. *Myers* states at 778:

> After reviewing the entire record, we conclude that, based on the evidence presented to the jury, reasonable people could have reached a different conclusion. Therefore, the trial court erred in granting American Seating's motion for directed verdict. However, our inquiry does not end here.
>
> Instead of remanding this matter to the trial court, we will decide de novo the liability of American Seating under the LPLA.[5]

Myers contradicts the decision of the Fifth Circuit in two ways: (1) The threshold issue to be determined in a product liability case is whether the product is unreasonably dangerous; and (2) Whether the product is being subjected to a reasonably anticipated use is a broad factual question.

8. The Respondents contend "hundreds of thousands of pounds of oilfield pipe were allowed to continue to lean against gravity as well as common sense and industry practice," and "each and everyone of Mr. Hunter's co-employees testified that the "use" of KREMCO's product on the day of the accident was known by the crew, including Mr. Hunter, to be dangerous, unnecessary, and against industry practice."

There were 143 stands of 3½ inch EUE N-80 tub-

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[5] Although the Fifth Circuit should have used a de novo standard of review, *Downes*, supra, it does not have the authority to apply the Louisiana appellate de novo standard of review. *Gasperini*, supra.

ing that varied between 55 to 65 feet in length and weighed 12.95 pounds per foot, a total weight of approximately 110,000 pounds. There were six rows (5 fingers) on each side of the racking board in which 12 stands of pipe had been racked vertically in a row, except that one of the rows would have had only eleven (11) stands. According to the testimony of Thomas Shelton, Ph.D., a mechanical and metallurgical engineer, the top of the last stand of pipe that was racked in the 12th row was leaning 11 inches from vertical toward the mast. The static weight of each row of 12 stands of pipe would approach up to 45 or 46 pounds; the total static weight of all 12 rows leaning toward the mast, and pulling against the rear handrail would have been less than 552 pounds. The weakest latch assembly would not commence plastic deformation (failure) until it was loaded in excess of 800 pounds. The pipe, tied in a line with the rope to the rear handrail, would be subject to movement from the vibration or shaking of the mast that would produce significant dynamic loading or pulling against the rear handrail. This dynamic loading caused the failure of the latch assembly and allowed the pipe to swarm.

Dr. Shelton demonstrated by diagrams that by using slotted fingers and three (3) chains to secure the tubing in the racking board,[6] the same pipe as racked that evening, which had developed an 11 inch lean toward the mast using rope to secure it in the racking board, could have been racked without developing any negative lean toward the mast. Rope is not an efficient method for securing pipe to prevent the development of lean toward the mast or the swarming of pipe. The reasonably anticipated use of rope to secure pipe in racking boards is well stated in a patent application filed August 7, 1979, entitled *"Working Board for Drilling Rig"*, U.S. Patent #4,335,792, under the Description of the Prior Art (P-24.1, pg. 5):

> When pipe stands were being stored or removed from the finger racks the workman had no mechanical

[6] An Alternative design that was manufactured by Wilson Manufacturing Company prior to the manufacture of this racking board by KREMCO in 1981.

means to aid him and the work was hard, physical and inherently unsafe. The pipe had to be tied by a rope to remain in the finger racks and a rope was not always effective.

Claude Hunter had worked 13½ hours. He was racking pipe using rope as he was instructed by his supervisor, Charles Berry, when he was killed by swarming pipe.

The facts do not support KREMCO's irresponsible and reckless statements, nor the opinion of the Fifth Circuit which violates the Hunters' Seventh Amendment right to a trial by jury.

CONCLUSION

This Court has the jurisdiction to grant a writ to review the Rule 50 and Seventh Amendment issues. By granting this writ application, this Court could resolve the conflict between the Circuit Courts on whether to liberally or strictly construe and apply Fed.R.Civ.P. 50 (a) (2) in determining (1) whether an Appellate Court has the *power* to review the sufficiency of the evidence, and (2) what is the proper standard to be followed by an Appellate Court in reviewing the sufficiency of the evidence.

Accordingly, Petitioners pray that a writ issue to review the decision of the Fifth Circuit granting judgment to KREMCO under Fed.R.Civ.P. 50, the judgment be vacated or reversed, and the case be remanded for consideration of the other issues raised in the appeal.

Respectfully submitted,

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APPENDIX RA

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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June 5, 1996

Mr. R. Layne Royer
Attorney at Law
P. O. Box 14879
Baton Rouge, Louisiana 70898

In re: No.94-40822 - Hunter v. Knoll Rig

Dear Mr. Royer:

Appellants' Notice of Intent to Move to Void Judgment, etc., was received on May 20, 1996; appellants' Brief and Appendix on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment, etc. were received on June 3, 1996.

Confirming our telephone conversation of this date, and at the direction of the Court, these documents are being returned unfiled with the advice that the Court has already ruled and no further action will be taken in this case.

Very Truly yours,

CHARLES R. FULBRUGE III, Clerk

BY: s/s Joan Perkins

Joan Perkins
Deputy Clerk

jp

cc: Mr. Ronald E. Raney
Mr. S. Price Barker

APPENDIX RB

ORIGINAL BRIEF ON SUGGESTION FOR HEARING EN BANC ON MOTION TO RECALL MANDATE AND VOID JUDGMENT GRANTED UNDER FED.R.CIV.P. 50 FOR LACK OF POWER ON BEHALF OF PLAINTIFFS-APPELLANTS CROSS-APPELLEES ILENE THURMAN HUNTER, ET AL

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

As a predicate to granting KREMCO a Judgment as a Matter of Law under Fed.R.Civ.P. 50, a majority panel of this Court stated:

> Post-verdict, ***
> As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of law on, *inter alia*, whether the accident occurred, as required by LPLA, during a "reasonably anticipated use" of the racking board.

About May 17, 1996, the Hunters discovered there were no facts of record that supported the statement that KREMCO moved, at the close of the Hunters' case and of all the evidence, for judgment as a matter of law on whether the accident occurred during a "reasonably anticipated use" of the racking board. The Hunters contend KREMCO waived its right to challenge the sufficiency of the evidence on appeal, and this Court had no power to grant a judgment under FED.R.Civ.P. 50, because KREMCO did not specify

why it was entitled to judgment as a matter of law before submission of the case to the jury.

Issue #1: Does this Court have the general jurisdiction to review the mandate to determine whether it should be recalled and voided for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

Issue #2: Should this Court exercise its general jurisdiction to recall and void the mandate for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The course of the proceedings and the disposition of the case will be included under the Statement of the Facts Necessary to the Argument of the Issues.

STATEMENT OF THE FACTS NECESSARY TO THE ARGUMENT OF THE ISSUES

This case is a wrongful death products liability action brought by the surviving spouse and children of Claude Hunter, Sr., against Knoll Rig & Equipment Manufacturing Company, Ltd., A Subsidiary of Draco Group of Companies, Ltd. (KREMCO), the manufacturer of a "drilling rig", and its insurer, National Union Fire Insurance Co. of Pittsburgh, PA. The suit was filed in Louisiana State Court, but removed by KREMCO to U.S. District Court on the basis of diversity jurisdiction. The survivors allege that Hunter was

a derrickman working for Mosley Well Service, when during the evening of August 29, 1990, while racking pipe up in the racking board of the KREMCO mobile rig, approximately 143 stands of pipe weighing 110,000 pounds swarmed out of the racking board, killing Hunter as it crushed him in the mast of the mobile rig. The survivors further allege that Hunter's death was proximately caused by three unreasonably dangerous characteristics of the racking board manufactured by KREMCO: (1) defective design; (2) lack of warnings and instructions; and (3) breach of an express warranty.

Prior to trial, the total of the damages suffered by the Hunters was stipulated to be the sum of ONE MILLION THREE HUNDRED EIGHTY FOUR THOUSAND ONE HUNDRED EIGHTY SEVEN AND NO/100 ($1,384,187.00) DOLLARS.

On Monday, May 2, 1994, the case proceeded to trial on the issue of liability. The Hunters rested during the morning of Thursday, May 5, 1994. (TTR.528; App.L). Following an argument over the admission of design drawings for an alternative racking board (TTR.528-532; App.L and M), KREMCO presented a Motion to Dismiss:

> "The Court: You had made reference, Mr. Raney, to some motion, I believe, that you wanted to make at the next recess. This is the next recess.
>
> Mr. Raney: Yes, sir, we would move to dismiss at this time on a directed verdict, Your Honor.
>
> The Court: All right, I'll consider that motion

> as having been made and denied, and we will be in recess for the next 20 minutes to allow you to prepare for your case in chief."
> (TTR.532, lines 11-19; App.M)

KREMCO stated no basis whatsoever for its motion to dismiss on a directed verdict.

KREMCO presented defense testimony during the rest of the day and at the end of the day on May 5, 1994, the Court delivered to the parties a draft of the Jury Instructions and scheduled a jury charge conference for the next morning at 8:30 A.M.

During the jury charge conference on May 6, 1994 (TTR.759-785; App.N), the Hunters objected to the issues of Mr. Hunter's fault and reasonably anticipated use going to the jury, and claimed they were entitled to judgment as a matter of law on these issues (TTR.761-768; App.N). Further, if the issue of reasonably anticipated use was to be submitted to the jury, then the Hunters requested an instruction on a list of three product uses cited by Mr. John Kennedy in *A Primer on the Louisiana Products Liability Act*, 49 La.L.Rev. 565, 581-582 (1989), as examples that are not reasonably anticipated product uses (TTR.765-768; App.N):

1) using a soft drink bottle as a hammer;
2) attempting to drive an automobile across water; and
3) putting perfume on a candle to scent it.

KREMCO noted several objections to the *wording* on some of the Jury Instructions and the Jury Verdict Form, including

reasonably anticipated use, and some objections were noted for the failure to include requested jury instructions on other issues. However, KREMCO never objected to submitting the issue of reasonably anticipated use to the jury (TTR.768-777; App.N). KREMCO's specific objection to the *wording* on the issue of reasonably anticipated use of the racking board was:

> "Mr. Raney: Yes, Sir, top of page 9, at the very top, continuing on from the 1st page, it says in other words, the way Mr. Hunter was using the product must have been something the manufacturer should expect might happen during the life of the product, and it would appear to me that that relies too much on mere foreseeability instead of reasonably anticipated use, and my suggested language for that would be must have been something the manufacturer should have expected during the life of the product.
>
> The Court: You're asking that the language should expect might happen be changed to should have expected?
>
> Mr. Raney: Yes, Sir, should have expected during the life of the product, and leave out might happen and change it accordingly to should have expected during the life of the product."
>
> (TTR.771, line 14 - TTR.772, line 5; App.N)

KREMCO's objection to the Jury Verdict Form (App.K; TTR.907-909, App.R) on the issue of reasonably anticipated use was as follows:

> "Mr. Raney: In No. 2 on the Jury Verdict Form it would be my suggestion that the language beginning in the middle of that sentence, quote, by an unreasonably

dangerous characteristic of the racking board simply be deleted, so that it should read do you find by a preponderance of the evidence that Mr. Hunter's death was caused during a reasonably anticipated use of that product, because No. 1 up above talks about the product being unreasonably dangerous in design because of a breach of a warning or express warranty.

The Court: No. 2 is designed to inject the issue of causation, which is not in No. 1.

Mr. Raney: All right, Sir.

(TTR.775, line 6-18; App.N)

Then, KREMCO objected to the Hunters' request for the list of unreasonable uses cited by Mr. Kennedy, and further requested that if the Hunters' requested list was to be submitted to the jury, then KREMCO requested that the Court include the examples from *Lockhart v. Kobe Steel Ltd. Const. Mach. Div.*, 989 F.2d 864(5th Cir.1993) and *Daigle v. Audi of America, Inc.*, 598 So.2d 1304, 1307 (La. App. 3d Cir.1992). Further, in presenting argument in opposition to the Hunters' request for a Judgment as a Matter of Law on the comparative negligence of Hunter, KREMCO argued as follows:

"***Our point is that Mr. Hunter is the one up there, as we heard from the testimony from the witness stand, who kept racking the pipe without calling down to anyone else, **and that certainly makes it a jury issue.**" (emphasis added)

(TTR.779, lines 12-15; App.N)

At the close of all the evidence, oral motions were presented:

'Mr. Raney: Thank you. And we would re-urge our motion at this time for dismissal.

The Court: The Motion for Judgment as a Matter of Law will be noted and denied at this time.

Mr. Posey: Your Honor, we would also like to move for a Judgement as a Matter of Law as to the comparative fault of Claude Hunter for the reasons earlier stated by Mr. Royer, and I won't go over those again at this time. And, also, as to the issue of reasonably anticipated use, it's our contention still that that is not within what is contemplated by the Law. The facts of this case clearly constitute a reasonably anticipated use of this product, and, therefore, that particular instruction should go to the jury.

The Court: I understand both of those arguments and they are noted. However, the Motion will be denied in those respects as well."

(TTR.891, line 16 - TTR.892, line 7; App.Q)

Again, KREMCO cited *no reasons* whatsoever for its motion for dismissal (treated by the Court as a Motion for Judgment as a Matter of Law).

The Court instructed the jury before closing arguments (TTR.894-909; App.R). After closing arguments, the Court asked counsel if there was anything further to be placed on the record:

"The Court: Thank you, please be seated. Is there anything further we need to put on the record at this time, Mr. Royer?

Mr. Royer: Your Honor, we would renew our objection to the reasonably anticipated use —

The Court: All of your objections are preserved; you don't need to renew them at this time. If there's anything additional, we can take it up, but the record is protected for you on it.

Mr. Royer: Okay, thank you. No, there's nothing else.

The Court: Okay. Mr. Raney, anything further?

Mr. Raney: Your Honor, I haven't compared the new jury instruction with the old in terms of the comparative negaligence part that was changed, but I do understand you're reserving objections on that, on the changed part, and that's sufficient for my needs. We had asked for additional instructions from the Marzula case.

The Court: Oh, certainly. All the requests that you made previously, you're protected on those, so you don't need to renew that at this time.

Mr. Raney: All right, thank you."
(TTR.953, lines 4-25; App.S)

At no time before submission of the case to the jury did KREMCO make a Motion for Judgment as a Matter of Law citing any *reasons*, law or facts entitling it to such a judgment.

The jury answered the Jury Verdict Form (App.K) finding, among other things, "Mr. Hunter's death was caused by an unreasonably dangerous characteristic of the racking board during a reasonably anticipated use of that product." Pursuant to the jury verdict and the application of LA.C.C.

Art. 2324, the Court awarded the Hunters fifty (50%) percent of the total stipulated damages against KREMCO. Pursuant to stipulation, the District Court found that R. L. Long Company was insolvent and the Hunters had not received any compensation from R. L. Long Company who was not made a party to the lawsuit. The Hunters moved to alter or amend the judgment by disregarding the fault assessed to the non-parties, R. L. Long Company and Mosley Well Service, to award the Hunters approximately eighty-five (85%) percent of their total stipulated damages, but the motion was denied.

Following the jury verdict, KREMCO filed a pleading entitled Motion for Judgment as a Matter of Law alleging for the first time the verdict should be vacated because Hunter's death did not occur during a "reasonably anticipated use" of the racking board (App.E). KREMCO's Memorandum in Support of Motion for Judgment as a Matter of Law (App.F) further expounded on why the jury verdict should be vacated. Hunter filed an Opposition Memorandum (App.G), but the issue of waiver of KREMCO's Rule 50 Motion was not raised or discussed. KREMCO filed a Response Memorandum in Support of the Motion for Judgment as a Matter of Law (App.H). A Memorandum Ruling on KREMCO's Motion for Judgment as a Matter of Law denied KREMCO's Motion on the merits without questioning whether KREMCO waived the right to file the Motion (App.H).

The Hunters appealed the District Court's apportionment of damages against KREMCO. KREMCO cross-appealed contending numerous errors were committed, including the primary error that the racking board was not being subjected to a reasonably anticipated use by Mr. Hunter

when he was killed. At no place in KREMCO's Original or Reply Brief is Rule 50 cited, nor is there any statement that KREMCO did or did not waive its right to judgment as a matter of law under Rule 50. KREMCO did allege under the Statement of the Case at page 3 of the Original Brief:

> After a recess subsequent to the close of the Hunters' case in chief during which various issues were discussed, Kremco made a motion for a verdict as a matter of law which was denied by Magistrate Judge Payne. At the close of all of the evidence, Kremco again made such a motion, which was also denied.
>
> Shortly after judgment was rendered, Kremco renewed its motion by filing a written motion for judgment as a matter of law asserting various issues therein; Judge Payne again denied relief, ruling that such matters were jury questions and refusing to vacate the jury verdict."

On November 29, 1995, in a 2 to 1 decision, a panel of this Court reversed the jury verdict and held that, as a matter of law under Rule 50, a reasonable juror could not have reached the conclusion that the use of the racking board on the evening of the fatal accident was a use that was, or should have been, reasonably anticipated by KREMCO (App.B). *Hunter v. Knoll Rig & Equipment Mfg. Co., Ltd.*, 70 F.3d 803 (5th Cir.1995). As a predicate to granting KREMCO a Judgment as a Matter of Law under Rule 50, a majority panel of this Court stated:

> Post-verdict, ***
>
> As it had at the close of the Hunters' case and of all the evidence, KREMCO moved for judgment as a matter of

law on, *inter alia*, whether the accident occurrred, as required by LPLA, during a "reasonably anticipated use" of the racking board.

(THIS STATEMENT IS WRONG.)

On December 13, 1995, the Hunters filed a Petition for Rehearing and a Suggestion for Rehearing En Banc that addressed the perceived substantive factual and legal errors in the majority opinion. Counsel for the Hunters still did not question the Court's power or the procedural issue of waiver under Rule 50, and without questioning the erroneous statement of the majority panel, counsel for the Hunters repeated the error in the Suggestion for Rehearing En Banc under the Statement of the Course of Proceedings and Disposition of the Case, at page 3, as follows:

> At the close of Plaintiffs' case, and after all evidence had been admitted, KREMCO moved for judgment as a matter of law contending that Hunter's death was not caused during a "reasonably anticipated use" of the racking board, and that the racking board was not unreasonably dangerous. Each Motion was denied by the Magistrate.
>
> **(THIS IS AN ERRONEOUS STATEMENT.)**

The Petition for Rehearing and the Suggestion for Rehearing En Banc were denied on March 28, 1996 (App.A).

In anticipation of preparing an Application for Writ of Certiorari to be filed with the U.S. Supreme Court, following an exhaustive study of the trial transcript, the record (pleadings) filed in the Trial Court, and the Briefs of all parties that have been filed in this Court, along with an in depth study of the case law and treatises that discuss

Rule 50, about May 17, 1996, counsel for the Hunters discovered that KREMCO was not entitled to a Judgment under Rule 50 in this Court because KREMCO failed to specify any facts or law entitling it to such a judgment at the close of the Hunters' case, at the Jury Charge Conference, at the close of the evidence, or at any other time before submission of the case to the jury. On May 17, 1996, counsel for the Hunters filed a "Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction" that informed this Court and other counsel of record of the Hunters' discovery, and that pleadings would be filed within fourteen (14) days for consideration by the Court, en banc, unless ordered to proceed otherwise.

ARGUMENT AND AUTHORITIES

Fed.R.Civ.P. 50(a) (2) provides:

> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion **shall specify the judgment sought and the law and the facts** on which the moving party is entitled to the judgment. (emphasis added).

This Circuit discussed the consequences of noncompliance with the specificity requirement in *McCann v. Texas City Refining, Inc.*, 984 F.2d 667 (5th Cir.1993), at pages 672-673:

> "Rule 50(a) requires a motion for a directed verdict to state the specific grounds for granting the motion. See *Woods v. Sammisa Co.*, 873 F.2d 842, 853 (5th Cir.1989). A party may not base a motion for JNOV on a ground that was not included in a prior motion for a directed

verdict. 5A Moore's Federal Practice, supra, Paragraph 50.08. Yet at no point did Hill specifically object to the sufficiency of the plaintiffs' evidence on the issue of willfulness. . . . "It would be a constitutionally impermissible re-examination of the jury's verdict for the district court [or this Court] to enter judgment n.o.v. on a ground not raised in the motion for directed verdict." Sulmeyer v. Coca Cola Co., 515 F.2d 835, 946 n. 17 (5th Cir.1975), cert. denied, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976). *****

Since Hill did not actually move for a directed verdict on the issue of willfulness at the close of all the evidence—and consequently was not entitled to move for a JNOV on the issue—Hill's objection to the sufficiency of the plaintiffs' evidence on willfulness is being raised for the first time on appeal. It is the unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error. *Shipman v. Central Gulf Lines, Inc.*, 709 F.2d 383, 388 (5th Cir.1983). In other words, this Court will reverse only if the judgment complained of results in a "manifest miscarriage of justice." *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir.1978). Thus, the question before this Court is not whether there was substantial evidence to support the jury verdict, but whether there was any evidence to support the jury verdict. Id. Even if no evidence supports the verdict, **this Court lacks the power to enter judgment for the appellant.** (emphasis added). Instead, appellate relief is limited to ordering a new trial. *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228 (5th Cir.1988), cert. denied 493 U.S. 822, 110 S.Ct. 80, 107 L.Ed.2d 46 (1989); *Gorsalitz v. Olin Mathieson Chem. Corp.*, 429 F.2d 1033, 1028 (5th L.Ed.2d 807 (1972); see 5A Moore's Federal Practice, supra, Paragraph 50.05(1)."

Issue #1: Does this Court have the general jurisdiction to review the mandate to determine whether it should be recalled and voided for lack of power to grant KREMCO a judgment as a matter of law under Rule 50, and/or to prevent injustice?

The Hunters contend that this Court has general jurisdiction to recall the mandate under 5th Cir.R. 41.2 which provides "A mandate once issued shall not be recalled except to prevent injustice." The Hunters have been caused an injustice by the mandate issued by this Court. *In Re Incident Aboard the D/B Ocean King,* 877 F.2d 322 (5th Cir.1989). If 5th Cir.R. 41.2 is not the proper procedural and jurisdictional rule to follow, the Hunters contend that Fed.R.App.P. 47(b) and Fed.R.Civ.P. 60 (See e.g. *Pierce v. Cook & Co., Inc.,* 518 F.2d 720 (10th Cir.1975)) provide the general procedure and power for this Court to review the mandate.

Issue #2: Should this Court exercise its general jurisdiction to recall and void the mandate for lack of power to grant KREMCO a judgment as a matter of law under Fed.R.Civ.P. 50, and/or to prevent injustice?

MacArthur v. University of Tex. Health Center Tyler, 45 F.3d 890 (5th Cir.1995), at pages 896-897, enunciates the principles that must be followed by the Appellate Court to determine whether it has power under Rule 50:

> "Before addressing the question of the sufficiency of the evidence, however, we must address the procedural question of whether Painter waived his right to challenge the evidentiary support for the verdict when he failed to renew his motion for judgment as a matter of law at

the close of all evidence presented in this trial. In accordance with Rule 50(b) of the Federal Rules of Civil Procedure, it is well-settled that a motion for judgment as a matter of law must be renewed at the conclusion of trial in order to preserve the review of the sufficiency of the evidence on appeal. *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 671 (5th Cir.1993). In certain limited situations, however, we have excused technical non-compliance with Rule 50(b). See, e.g., *Davis v. First Nat. Bank*, 976 F.2d 944, 948 (5th Cir.1992), cert. denied, — U.S. —, 113 S.Ct., 2341, 124 L.Ed.2d 251 (1993) (Weiner, J.); *Merwine v. Board of Trustees for State Institutions*, 754 F.2d 631, 635 (5th Cir.1985), cert. denied, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985). Whether technical non-compliance with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal "should be examined in the light of the accomplishment of its particular purposes as well as in the general context of securing a fair trial for all concerned in the quest for truth." *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir. 1983), cert. denied, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). This rule serves two basic purposes: to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury. *Bohrer*, 715 F.2d at 216. In *Bohrer*, like here, the court reserved ruling on a motion for directed verdict made at the close of the plaintiff's evidence. Id. at 217. The defendants then presented substantial evidence to which the plaintiffs presented no rebuttal testimony. Id. We excused the defendants' failure to make a motion at the conclusion of all the evidence because the purposes of the rule were satisfied. Id. We concluded that

> [t]o demand a slavish adherence to the procedural sequence and to require these defendants, in this case, to articulate the words of renewal once the motion had been taken under advisement, would be 'to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules.'
>
> *Bohrer,* 715 F.2d t 217 (quoting *Quinn v. Southwest Wood Prods., Inc.,* 597 F.2d 1018, 1025 (5th Cir.1979)).

Since the issue was not previously raised by any party, it is believed that this Court did not procedurally question whether KREMCO waived its right to seek review of the sufficiency of the evidence, or whether this Court had the power under Rule 50 to review the sufficiency of the evidence.

In hindsight, it is noteworthy that KREMCO did not specify any particular pre-verdict issues that were preserved for appeal under Rule 50, nor did KREMCO cite the particular pages of the transcript where it had specified any facts and law for judgment as a matter of law on any issue prior to the submission of the case to the jury. However, in its Original Brief, KREMCO challenged the sufficiency of the evidence on every issue that was decided by the jury against KREMCO. Additionally, KREMCO did not include in the Record Excerpts that were furnished to the Court the Motions that were made during the trial at the close of the Hunters' case and at the close of all the evidence, as would seem to be required by Fed.R.App.P. 30 and 5th Cir.R. 30.01.4 (f).

The Hunters respectfully submit that this Court, under

McCann and *MacArthur, supra,* had no power to render judgment under Rule 50 since KREMCO failed to cite any facts or law entitling it to judgment as a matter of law. The reason behind the rule, to give the opposing party notice of Movers' contentions and the opportunity to adduce additional evidence to refute those contentions, is the very reason an injustice has been suffered by the Hunters in this case. They were not advised, until *after* the jury verdict, that KREMCO considered their evidence on this issue to be insufficient.

CONCLUSION

The Hunters, through no fault of their own, have suffered an injustice as a result of the mandate issued by this Court. This Court had no power to issue the mandate. This Court should exercise its general jurisdiction to recall and void the mandate.

CERTIFICATE OF SERVICE OF ORIGINAL BRIEF

I certify that a copy of the Original Brief on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment granted Under Fed.R.Civ.P. 50 for Lack of Power on Behalf of Plaintiffs' Appellants/Cross-Appellees, Ilene Thurman Hunter, et al, with attached Appendix of Original Brief on Suggestion for Hearing En Banc on Motion to Recall Mandate and Void Judgment granted Under Fed.R.Civ.P. 50 for Lack of Jurisdiction on Behalf of Plaintiffs-Appellants/Cross-Appelleees, Ilene Thurman Hunter, et al, was served on the following parties in these proceedings, by First Class United States Mail, properly addressed and postage prepaid on the 31st day of May, 1996:

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APPENDIX RC

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 94-40822

FILED
MAY 20 1996

ILENE THURMAN HUNTER, ET AL	PLAINTIFFS-APPELLANTS, CROSS-APPELLEES
VERSUS	
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	DEFENDANTS-APPELLEES, CROSS-APPELLANTS

§ § § § § § § §

NOTICE OF INTENT TO MOVE TO VOID JUDGMENT GRANTED UNDER F.R.C.P. 50 FOR LACK OF JURISDICTION

NOW INTO COURT come Plaintiffs, Ilene Thurman Hunter, obo, Kathy Michelle Hunter, Claude Kenneth Hunter, Jr., Michael Christopher Hunter, and Melissa Ilene Hunter, and Donnovan Blaine Hunter, through undersigned counsel, who respectfully represent that undersigned counsel has discovered through research of the applicable law, and a thorough and detailed study of the record, transcript, briefs, and other pleadings of record in this civil

action, at the close of the Plaintiffs' case, the Defendants, Knoll Rig & Equipment Manufacturing Company, Inc., a Subsidiary of Draco Group of Companies, Ltd., and Fidelity & Casualty Company of New York, presented the following oral motion at page 532 of the trial transcript — "Yes, sir, we would move to dismiss at this time on a directed verdict, Your Honor." — and at the close of all the evidence, the Defendants presented the following oral motion at page 891 of the trial transcript — "Thank you. And we would re-urge our motion at this time for dismissal."; The Defendants did not specify any particular reasons for a judgment as a matter of law until a formal motion was filed after the jury granted a verdict and a judgment was entered by the District Court on the jury verdict; Having failed to assert specific reasons why they should be granted a judgment as a matter of law during the trial, the Defendants were not entitled to raise those issues in their Motion for Judgment as a Matter of Law after the jury returned the verdict, and this Court did not have the jurisdiction to grant the Defendants a judgment as a matter of law under F.R.C.P. 50, See *Sulmeyer v. Coca Cola Company,* 515 F.2d 835 (5th Cir.1975 at page 846), and *Sector Refining, Inc. v. Enterprise Refining Co.,* 771 F.2d 496 (T.E.C.A.1985 at pages 504-505); It is the intent of Plaintiffs, through undersigned counsel, to file a formal motion to void the Judgment entered herein by the Court of Appeals for lack of jurisdiction, along with a supporting Brief, within the next fourteen (14) days, for consideration by the Court, en banc, unless ordered to proceed otherwise by this Court.

Respectfully submitted,

R. LAYNE ROYER, LTD.

/s/ Layne Royer

Layne Royer
Attorney for Plaintiff
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LA. Bar Assoc. Roll No. 11518

CERTIFICATE OF SERVICE

I certify that a copy of the Notice of Intent to Move to Void Judgment Granted Under F.R.C.P. 50 for Lack of Jurisdiction of Plaintiffs-Appellants/Cross-Appellees, Ilene Thurman Hunter, et al, was served on the following parties in these proceedings, by First Class United States Mail, properly addressed and postage prepaid on the 17th day of May, 1996:

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APPENDIX RD

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

RECEIVED
MAY 27 1994

FILED
MAY 27 1994

ILENE THURMAN HUNTER, ET AL	:	CIVIL ACTION NO. 91-0337
VERSUS	:	JUDGE STAGG
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	:	MAGISTRATE PAYNE

MOTION FOR JUDGMENT AS A MATTER OF LAW

NOW INTO COURT, through undersigned counsel, comes **KNOLL RIG AND EQUIPMENT MANUFACTURING COMPANY, LTD, A SUBSIDIARY OF DRACO GROUP OF COMPANIES, LTD.**, defendant in the above entitled and numbered cause and respectfully show the following:

1.

The above matter was tried by civil jury during May 2-6, 1994, and a verdict was rendered by the jury on May 9, 1994. The Jury interrogatories and/or verdict form, along

with the judgment thereafter prepared by the Court, are contained in the record of this matter. Oral motions for judgment as a matter of law were made by KREMCO at the close of plaintiffs' case and at the close of all of the evidence.

2.

As a portion of its verdict, the jury determined that the accident at issue occurred during a "reasonably anticipated use" of the product in question. Kremco herein contends that this finding is manifestly erroneous as a matter of fact and law, and that such a conclusion could not have been correctly reached based upon the evidence adduced at trial.

3.

As a result of the foregoing, and as more fully explained in the memorandum supporting this motion, the verdict of the jury should be set aside; the Court should find that defendant's product was not being subjected to a "reasonably anticipated use" at the time of the accident, and defendant herein should thus be exonerated.

4.

Defendant reserves its right to assert other issues and/or arguments which may further be available to it in this Court or on appeal, including but not limited to matters relating to jury instructions, allocation of fault by the jury to Claude Hunter or others, calculation of the judgment, and all other matters.

LUNN, IRION, JOHNSON, SALLEY & CARLISLE
Post Office Box 1534
Shreveport, Louisiana 71165-1534
BY: /s/ Ronald E. Raney (CW5)

RONALD E. RANEY
ATTORNEY FOR KNOLL RIG AND EQUIPMENT
MANUFACTURING COMPANY, LTD.,
A SUBSIDIARY OF
DRACO GROUP OF COMPANIES, LTD.

APPENDIX RE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

FILED
MAY 27 1994

ILENE THURMAN HUNTER, ET AL	:	CIVIL ACTION NO. 91-0337
VERSUS	:	JUDGE STAGG
KNOLL RIG & EQUIPMENT MANUFACTURING CO., LTD.	:	MAGISTRATE PAYNE

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW

MAY IT PLEASE THE COURT:

The Court is well aware of the issues and evidence involved in this matter, which was recently tried beginning on May 2, 1994. While there may be other items which the parties will appeal at a later date, defendant herein raises a threshold issue which is of overriding importance.

Factual context

Defendant contends that the finding of the jury that

the product in question was being subjected to a "reasonably anticipated use" at the time of the accident in question is manifestly erroneous. This contention is based upon the following analysis.

As the court will recall, the accident occurred while the employees of Mosley Well Service, including Claude Hunter, were racking pipe (also sometimes referred to as tubing) in the racking board after removing it from the hole. Common sense, as well as normal industry practice, dictates that the pipe be leaned *away from the mast* — in that position, it is supported by the *frame* of the racking board, which is the strongest member, *not* by the rear handrail or related components.

The direction of the pipe was even more critical in this particular case due to modifications made to the racking board by the original purchaser, R.L. Long and Company (hereafter, Long). As was shown at trial, Long had changed the latching system used to retain the rear handrail — the latching system was modified by Long so that it was not as strong as the handrail itself.

Additionally, it was shown that such modifications by Long were unsafe and unnecessary. Other Kremco rigs originally sold to Long still had a latching system which was either the original Kremco design or of the same basic configuration (referring to the rigs owned by Donald Bowling in Canada, which were the subject of a stipulation by the parties in this respect).

Plaintiffs have continuously asserted that "tying the pipe to the rear handrail" is one of the main issues in this

case. In actuality, however, this is nothing more than a red herring.

As a practical matter, there is nothing dangerous about tying pipe to the rear handrail of Kremco's racking board as long as the pipe is leaned properly, i.e., away from the mast and against the frame — *in that position, the handrail is not, in any manner or to any degree, supporting the weight of the pipe.* Although several witnesses indicated that tying the pipe might prevent its movement under "high wind" conditions, there was no evidence adduced at trial that "high winds" (*which were not present at the time of the accident*) would be capable of exerting forces sufficient to cause a failure of any portion of the racking board as originally manufactured by Kremco.

Regardless of the merit (or more accurately, the lack thereof) of the foregoing false issue, and while the record has not yet been transcribed, the testimony of all of the Mosley witnesses, among others, clearly established their knowledge of the fact that leaning the pipe toward the mast is against industry practice, improper and dangerous. All of these witnesses testified that anyone with years of experience in the oilfield industry (of which Mr. Hunter had approximately twenty) would be aware of such.

With particularity, the Court should recall the testimony of Mosely employees Dan Ray and Charles Berry, and one of its co-owners, Tommy Mosley. These can be briefly paraphrased as follows (since the testimony cannot be reviewed at this time, the following has been taken from trial notes and recollection — any error as to specific words or phrases is unintended).

Mr. Ray acknowledged that leaning the pipe toward the mast was improper and unsafe, and that the rear handrail was not meant to be subjected to such. He further stated that engaging in such a practice could subject portions of the racking board, including the rear handrail assembly, to stresses or forces for which they were not meant. The testimony of Mr. Berry was highly similar, except that he attempted to assert the foregoing "high winds" argument for which no evidence was ever asserted.

Tommy Mosley likewise asserted the impropriety of leaning the pipe toward the mast. More importantly, however, Mr. Mosley went even further and expressly stated that he knew the rear handrail (which, as stated above, had been subjected to inappropriate and unnecessary modifications by the R.L. Long Company) would come forward if it was subjected to the pipe being leaned in such a manner.

In addition to the Mosley witnesses, the Court heard the testimony of Ralph Busse (defendant's expert), and Jack Reeve (an expert deposed by plaintiffs prior to trial whose deposition was offered by defendant). *These two witnesses were the only ones who had ever designed a racking board* — both testified that they would never have anticipated that a user would allow pipe to lean toward the mast. Defendant does not recall any testimony on the aspect of design which contradicted this position.

Some of the witnesses who testified on behalf of plaintiffs attempted to assert that, in some situations, the pipe is leaned toward the mast merely in order to "get it all in the racking board". It was shown at trial, however, through the testimony of Mr. Mosley and others, that when the pipe

can no longer be racked properly, it should be "layed down" (either on the ground or on a separate pipe rack which is itself located on ground level).

Furthermore, it was conclusively shown, by photographs taken immediately after the occurrence, that there was equipment on-site at the time of the accident (a forklift and a catwalk) which could have been used to lay the pipe down. Even plaintiffs' witnesses who testified on this issue admitted that the decision as to whether to "lay down" is solely a matter of convenience — i.e., laying the pipe down is less convenient, since the process is more time consuming. The jurisprudence discussed infra clearly shows that a use which is merely more convenient, yet is nonetheless shown to be unsafe and improper, cannot as a matter of law suffice to meet the test of a "reasonably anticipated use". Under the circumstances described above, Kremco should not be held liable.

As stated elsewhere, it is important for the court to remember that, *as admitted by plaintiffs' own experts during the trial, the rear handrail itself did not experience a physical failure* — rather, the latches manufactured and installed by Long are what failed, allowing the handrail to come forward. For that matter, and as also admitted by plaintiffs' experts, *no part of the rig manufactured by Kremco experienced a physical failure which resulted in Mr. Hunter's death.*

Discussion of facts and law

In the context of the aforementioned facts, two recent cases from the Louisiana jurisprudence are pertinent. These are *Lockart v. Kobe Steel,* 989 F.2d 864 (5th Cir. 1993), and

Daigle v. Audi of America, Inc., 598 So.2d 1304 (La. App. 3rd Cir. 1992), writ denied.

As the court in *Lockart* held, citing *Daigle,* the concept of "reasonably anticipated use" under the Louisiana Products Liability Act is narrower than the prior jurisprudential concept of a mere "normal use" (which included "foreseeable misuse"); see *Lockart* at 867. Thus, any argument that Kremco should be liable based upon mere "foreseeable misuse" would be insupportable.

Lockart, however, is important not only because of the above pronouncement of law, but equally so in view of its own factual context. In that case, the plaintiff and his co-employees were operating an item of heavy construction equipment known as an "excavator", which utilized a "bucket" on the front — the bucket had a series of "teeth" on it which could be used for various purposes. Plaintiff was injured after suspending an item from the teeth of the bucket and then working under it.

The manufacturer of the equipment had included a warning which specifically indicated that the use of the bucket in this manner was improper. Attached hereto is a copy of the pictorial which the manufacturer used in this regard.

In the present case, of course, no warning by Kremco was necessary or required. Not only were the Mosley employees, including Mr. Hunter, already aware of the danger, but said danger was obvious; see LSA-R.S. 9:2800.57. Furthermore, and in any event, Mosley itself, even if based solely upon the testimony of Tommy Mosley as described above, was certainly aware. The law is clear that where an

employer is a sophisticated purchaser or user who is already deemed aware of the danger, the manufacturer need not give a warning of its own and can rely upon said employer to convey such to his employees; *Davis v. Avondale Industries, Inc.*, 975 F.2d 169 (5th Cir. 1992).

Lockart is thus important because the court found that plaintiff's *method* of using the bucket did not constitute a reasonably anticipated use. This Court should note that the bucket in *Lockart* was indeed capable of safely supporting a load of the type which had been attached to it (just as Kremco's racking board is capable of safely racking and holding pipe) — however, *the bucket was not intended to support such loads in the manner in which plaintiff and his co-workers were attempting at the time of the occurrence.* The plaintiff and his co-workers may have felt that this manner of using the product was more convenient or less time consuming, or perhaps they rationalized their actions on some other basis — the Fifth Circuit, however, would not allow that manner of use, regardless of the underlying motivation, to be classified as reasonably anticiapted.

Similarly, in *Daigle,* the state appellate court held that it was not a reasonably anticipated use for the plaintiff, who was inspecting a vehicle for possible purchase, to insert his hand inside an area of the vehicle into which he could not see, especially while the motor was running. Thus, although the inspection of a vehicle would certainly be an anticipated use under other circumstances, such became "not reasonably anticipated" due to the manner in which that particular inspection was being attempted. Again, the plaintiff in *Daigle* may have felt it was more convenient to attempt to inspect the vehicle with the engine running, but such simply could

not rise to the level of a reasonably anticipated use.

These cases make it absolutely clear that "any foreseeable use" of a product does not thereby equate to one which can legally be accepted as "reasonably anticipated". For instance, one may attempt to drive a car at high speed on a wet, sharply curved roadway at night without headlights, but merely because the car is "being driven" does not mean that "all driving activities" must be reasonably anticipated by the manufacturer.

Similarly, merely because Kremco's racking board is designed to "rack pipe" does not mean that "all pipe racking activities" must automatically have been reasonably anticipated. *Lockart* and *Daigle* stand for the proposition that a use which is undertaken in violation of common sense or industry practice, and/or with knowledge of impropriety or danger, clearly cannot be considered as reasonably anticipated.

Conclusion

Based upon the testimomy of his own co-workers and superiors (as well as others) at trial, Mr. Hunter and his crew were not engaged in a "reasonably anticipated use" of the product at the time of this accident. The evidence is clear that the act of leaning the pipe toward the mast was known by all concerned to be improper, unsafe, and against the practices of the industry as well as of Mosley Well Service.

As a result, the verdict of the jury should be vacated

and judgment should be entered in favor of Kremco.

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CERTIFICATE

I HERBY CERTIFY that a copy of the above and foregoing document has this day been forwarded to all counsel, by placing same in the United States mail, properly addressed, with adequate postage paid thereon.

Shreveport, Louisiana this 27th day of May, 1994.

/s/ Ronald E. Raney

OF COUNSEL